



U.S. Citizenship
and Immigration
Services

File: WAC 02 285 50932 Office: CALIFORNIA SERVICE CENTER

Date: OCT 26 2004

IN RE: Petitioner:

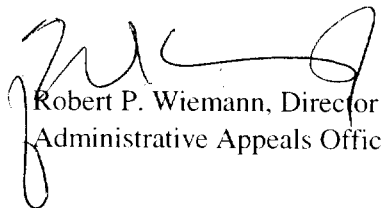
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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protect privacy

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in July 2000. It imports and distributes soap and personal care products. It seeks to temporarily extend the employment of the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims that it is a wholly owned subsidiary of Cescraft International Mfg., Inc., located in Rizal, Philippines.

The director denied the petition concluding that the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's decision is contrary to an unpublished AAO decision and the evidence presented in support of the petition.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means an assignment within an organization in which the employee primarily

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term “executive capacity” means an assignment within an organization in which the employee primarily

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In an August 30, 2001 letter appended to the petition, the petitioner stated that the beneficiary's position of general manager involved executive functions, including setting all corporate policies and developing all corporate strategies to penetrate the US market. The petitioner also indicated that the "current marketing professionals and professional designers are responsible to [the beneficiary]." The petitioner further noted that the beneficiary's duties included creating "a big market niche for the company's breakthrough and unique product that is slowly penetrating the High-End Spas, boutique and ongoing negotiation with hotels in Las Vegas."

On November 6, 2002, the director requested: (1) a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels and including names of all executives, managers, supervisors, and number of employees within each department or subdivision; and, (2) a copy of the petitioner's California Forms DE-6, Quarterly Wage Report, for the previous four quarters.

In a January 7, 2003 response, the petitioner provided its organizational chart depicting the beneficiary in the position of president and general manager. The chart also included positions for a marketing manager, a public relations/advertising manager, and administrative/operations manager, but the petitioner noted that these three positions were vacant. The chart named four agents working on commission and reporting to the vacant position of marketing manager and also included several unfilled assistant marketing positions and several unfilled production positions.

The petitioner described the beneficiary's position as "majority owner of the company" and her job duties as follows: "Plan, direct, coordinate the operations of the company. Formulates policies, managing daily operations, and planning the use of materials and human resources, diverse in nature to be classified in any one functional area of management and administration." The petitioner also included job descriptions for the vacant positions of marketing manager, public relations/advertising manager, and administrative/operations manager. The job descriptions indicated that the "managers" would be responsible for performing duties associated with marketing, promotions, bookkeeping, and accounting. The petitioner also provided a sample sales representative agreement that indicated the agents were appointed sales representatives. The petitioner also noted that the two California agents also "helped out in manning the Showroom and doing some Production works for the General Manager in exchange for a 1% Sweat Equity from the company."

The director determined: (1) that the petitioner's description of the beneficiary's duties was general; (2) that the beneficiary would perform the duties of the marketing manager, the public relations/advertising manager, and the administrative/operations manager as these three positions were vacant; and, (3) that the beneficiary as the petitioner's sole employee would perform the petitioner's operational tasks as the petitioner did not have employees who would relieve her from performing non-qualifying tasks.

On appeal, counsel for the petitioner: (1) relies on an unpublished decision; (2) asserts that a one-year period is not sufficient to show the whole complementary crew of managerial and supervisory staff; (3) contends that the one-year period is sufficient to show that the beneficiary is an executive who directs the management of the organization or performs a function of the organization, establishes the goals and policies of the organization, exercises wide latitude in discretionary decision-making, and is only responsible to the board of directors of the company; (4) observes that the director must take into account the reasonable needs of the

organization and that the number of employees supervised is not determinative; and (5) claims that the petitioner's complexity requires the beneficiary's technical knowledge and expertise and the absence of the beneficiary will likely result in the petitioner's failure.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include setting all corporate policies and developing all corporate strategies to penetrate the U.S. market and creating "a big market niche for the company's breakthrough and unique product that is slowly penetrating the High-End Spas, boutique and ongoing negotiation with hotels in Las Vegas." The petitioner did not, however, define the policies or strategies, or clarify who would perform the duties enabling the petitioner to penetrate its target market. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner's response to the director's request for additional evidence does not further detail the beneficiary's duties. The petitioner again provides a general statement by indicating that the beneficiary is the majority owner and would plan, direct, and coordinate the operations of the company and formulate policies, manage daily operations, and plan the use of materials and human resources. The petitioner's statement generally paraphrases the definition of "executive capacity" without providing a comprehensive description of her daily duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, as the director determined, even though the petitioner claims that the beneficiary directs and manages the petitioner's marketing, public relations, administrative, and operational activities, it does not have anyone on its staff to actually perform these functions. The beneficiary is the only individual in the organization responsible for performing the marketing, public relations, administrative, and operational activities. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner's proposed employment of additional managerial employees is not relevant to this proceeding. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or

beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Counsel's reliance on the unpublished AAO decision is misguided. Counsel claims that the beneficiary as the petitioner's sole employee relies on independent contractors to carry out the functions of the organization. However, the record shows that the petitioner uses three to four sales representatives on an intermittent basis. The petitioner has not explained how the services of the contracted part-time sales representative obviate the need for the beneficiary to primarily conduct the petitioner's business. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, as stated previously, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel's assertion that a one-year period is not sufficient to show the petitioner's entire managerial and supervisory staff is unpersuasive. As observed above, the regulations and precedent decisions require that the petitioner show that it is capable of supporting a managerial or executive position when the extension petition for a new office is filed. See 8 C.F.R. § 214.2(l)(3)(v)(C) and *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248. Counsel's restatement of the definition of "executive capacity" to show that the beneficiary is an executive is similarly unpersuasive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Again, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Finally, counsel's claim that the petitioner requires the beneficiary's technical knowledge and expertise does not support the beneficiary's classification as a manager or executive. The beneficiary's knowledge and expertise do not contribute to a determination that the beneficiary will direct the management of or manage the organization, or a department, subdivision, function, or component of the organization.

In sum, the petitioner has not provided sufficient evidence to establish that the beneficiary's assignment for the petitioner is primarily managerial or executive. The record does not contain sufficient evidence to overcome the director's decision.

Beyond the decision of the director, the petitioner has presented conflicting information about its ownership and control. The petitioner claims that it is a wholly owed subsidiary of the beneficiary's foreign employer. The petitioner also notes that the beneficiary is its majority owner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.